IN THE SUPREME COURT OF MISSOURI

Case No. SC85809

PURLER-CANNON-SCHULTE, INC. and KARSTEN EQUIPMENT CO.,

Appellants,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS and CITY OF ST. CHARLES,

Respondents.

Transfer from the Missouri Court of Appeals, Eastern District

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APPELLANTS' SUBSTITUTE REPLY BRIEF

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Summary

The Court of Appeals transferred this case due to its general importance and interest. The case involves the Department's authority under the Missouri Constitution and the Prevailing Wage Act (the "Act") to change a prevailing wage rate classification for Outdoor Pipe Projects from that actually and lawfully paid for more than 40 years, without any evidence that such wage is, or has ever been, paid *anywhere* in Missouri as the prevailing wage for such work. This represents the most fundamental shift in Missouri history as to the Department's authority under the Act to set wage rate classifications without regard for, and even contrary to, the actual classification and wages paid locally and statewide. The Department has imposed its vision of what work must be paid as "similar" based on selected dictionary definitions while ignoring the wage rates and worker classifications actually used for such work in the marketplace. Thus, this Court must decide whether the Missouri Constitution, the Act, or the Rule itself may be interpreted to permit the Department to change wage requirements to impose its own preference as to what wage rates and worker classifications are applicable to public projects irrespective of the wage rates and classifications actually prevailing in the local as well as state wide marketplaces.

While the Department offers numerous arguments, mere legal argument does not create a genuine dispute of fact for summary judgment purposes. The Department either admits or offers *no* rebuttal affidavits or evidence as to the following: during more than forty years of industry practice in the Subject Counties, Laborer wage rates have

prevailed; the Department also offered no evidence that Pipe Fitter wages have ever been paid or prevailed *anywhere* in Missouri; a final appellate ruling against the Department affirming the payment of *Laborer* wage rates holds that the outdoor pipe work at issue was "customarily" performed by Laborers; evidence shows that the Laborer wage rate is still the marketplace wage paid; the Department's admitted change to its wage classification definitions was intended expressly to effect a change from that appellate ruling; the Department's admission that it's the Pipe Fitter Wage was *not* the enforceable wage rate prior to application of its 1996 Rule; and there are increased costs to local governments from the Department's new requirement in the tens of thousands of dollars for *each* project.

The consequence of the Department's change in wage rates was recognized by the Court of Appeals when it found that under the Department's scheme, the "prevailing wage" required in any county would in fact "differ from that county's market rates"! *See* Op. at p. 20 (No. ED83325 Mo.Ct.App. Jan. 27, 2004). As so enforced, the Act would lose its sole purpose. Wages required on public projects would no longer bear any relationship to the wage "paid generally in the locality" for that work – rather it would correlate to the wage generally paid for some other classification of work and worker that has no actual connection to the work being performed. While this may allow for convenient administration by the Department, such convenience is no justification for disregard of the purpose and text of the Act, nor is it any defense to the imposition of a wage rate classification that imposes a 42% higher wage rate on local governments.

I. THE DEPARTMENT REBUTS NONE OF THE MATERIAL FACTS SUPPORTING APPELLANTS' HANCOCK CLAIM.

Plaintiffs' Hancock claim ultimately requires this Court to answer the following question: May the Department lawfully force local governments and their contractors on public outdoor pipe projects to pay a 42% higher prevailing wage rate than that paid over the last forty years for the same work in the Subject Counties even though the Department concedes that this higher Pipe Fitter wage rate was not legally enforceable anywhere prior to its 1996 Rule?

The Department simply sidesteps the real question in this case by relying on legal contortions that wholly contradict the undisputed record and the Department's own admissions. The Department offers nothing to rebut the obvious historical facts shown by the affidavits, the *Essex I & II* decisions, the pre-1996 wage orders (state and federal), and even the Commission's own rulings proving that Laborer wages have always been the prevailing wage actually paid. *See* App.Br. at 30-33; *Essex Contracting, Inc. v. City of DeSoto*, 775 S.W.2d 208 Mo.App. 1989) ("*Essex I*"); *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135 (Mo.App. 1991)("*Essex II*). Nor does the Department dispute that it could not legally require payment of the Pipe Fitter wage prior to application of its new Rule. The Department even admits that it imposed Pipe Fitter wages by its Rule without ever reviewing the wage rate classifications *actually* paid or worker type *actually* used anywhere in the State, nor did it have evidence that the Pipe Fitter wage has *ever* been paid anywhere for this work. (LF 162; *see* App.Br. 51-52). On these facts, the

Department's protest that there has been no change in any prevailing wage "requirement" is absurd.

The unrebutted record cannot be ignored: the Department has imposed a wage rate *different* from that legally paid and enforced in the past and this has resulted in substantial new higher costs to local governments that contract for public projects. Whatever the justification – whether well-intentioned or arbitrary – enforcement of the Pipe Fitter wage rate is unequivocally a new *requirement* from that in the past.

A. The Department Has Changed The *Required* Wage Rate.

Despite having no rebuttal evidence, the Department makes the ludicrous assertion that there has been no "change" in the prevailing wage rate required for Outdoor Pipe Projects because the Department has allegedly not "changed its position" that Pipe Fitter wages should be paid. (Resp.Sub.Br. 29-30). Even if true, this is irrelevant to a Hancock claim. A taxpayer need not prove a change in an agency's internal philosophy or "position" about the law; it need only show that the activity the agency actually *requires or enforces* caused an unlawful increase in costs. As the Department itself described, a Hancock claim is stated if "the Department has somehow *required* political subdivisions to undertake a new or increased activity." (Resp.Sub.Br. 14)(emphasis added). Thus, even if the Department's internal desire has always been to force Pipe Fitter wages to be paid regardless of the wage rate that actually prevailed – and even though it previously could not legally do so as reflected in the judgments against it in *Essex I & II* – such alleged internal "consistency" as to the rate it desired to enforce is no defense to now actually "requiring" such new wage rate including in the same locality in which that same

wage rate was held unlawfully imposed. Under any definition, the Department's actions have now changed the prevailing wage rate that is *enforced* and *required*!

Moreover, even the assertion that the Department has "not changed its position" is itself contradicted by the Department's admission that its enforcement position prior to the 1996 Rule was that it had "no authority" to require anyone to pay the Pipe Fitter wage rate and by its acknowledgement that the Laborer wage rate was in fact required by the court in the *Essex I & II* cases. (*See* App.Br. 30) The Department further admits that its first "enforcement" of Pipe Fitter wages on Outdoor Pipe Projects came only after it affirmatively changed the definition of the "General Laborer" classification and a complaint by the pipefitters' union in which they remind the Department of its pledge to "settle cases differently in the future." (*See* App.Br. 15, 30.) Nor does the Department dispute that this enforcement comes only *after* the Department affirmatively changed the definition of the "Laborer" classification. Finally, the Department's "change" in position and enforcement was also clearly articulated by Director Baker who explained to state legislators that, "Prior to the rule, work in connection with *water and sewer mains* was classified as *Heavy Laborer* . . . ." *(See* S-33, 37, Colleen Baker letters to Rep. Hanaway and Rep. Loudon, respectively)(emphasis added). Is there any doubt that this is a "change" from the Department's current imposition of Pipe Fitter (not Heavy Laborer) classification on the St. Charles Water Main project at issue here? The Department created no genuine dispute to rebut this proof that the Act is now being *enforced* with a different wage rate requirement than in the past.

The Department asks this Court to disregard the decisions in *Essex I & II*, asserting that those cases did not address the "similar work" question but held "in essence" that the wage rate typically paid to Laborers in Jefferson County "set the prevailing wage rate for the occupational title of Pipe Fitter in that County." (Resp.Sub.Br. 31.) In other words, the Department claims that *Essex I & II* really determined that all Pipe Fitter classification work was "customarily" paid Laborer wages in that county.

This assertion is wrong for two reasons. First, these decisions never stated or even implied that outdoor pipe work was "Pipe Fitter" work. To the contrary, the *Essex II* holding affirmatively *rejected* application of the "Pipe Fitter" classification and affirmed payment of "Laborer" rate because it was "laborers in Jefferson County" that "customarily" installed such outdoor pipe. *815 S.W.2d at 139*. In affirming payment of Laborer classification wage rates as the required prevailing wage, the court's holding by definition was a determination that, under the Act, the outdoor pipe work at issue was "similar work" – in this case, *identical* work – to the work performed by Laborers, not Pipe Fitters. *Id* at 135, 138.

Second, the Department misses the significance of the *Essex II* judgment against it in a Hancock context. It makes no difference *why* the Department's imposition of Pipe Fitter wage rates was held illegal – it matters only that the "required" wage was in fact held to be Laborer classification not Pipe Fitter classification. *Essex II* precluded enforcement of Pipe Fitter wage rates for the same work and in the same locality the Department now seeks to reimpose those same higher wage rates. While admitting it

lacked "authority" to impose Pipe Fitter wages as of 1985 or 1989 or even as of 1995, the Department now relies on its 1996 Rule to create new "authority" while admitting that the "market" practices and rates have not changed – only its claimed "authority" has changed. (UF 35, LF 682-3; LF 162-63, Boeckman Dep. at 75-76.) Even if such a maneuver did not violate the Act, this change in "authority" imposes a new requirement on public contracts – a requirement previously held unlawful – in that it imposes the significantly higher wage rate for Pipe Fitter that was held *not* required to be paid in *Essex II.*

The Department's need for historical revision of *Essex I and II* is understandable given those court's findings as to the repeated unlawful motives of the Department. In attempting to impose Pipe Fitter wages on work traditionally performed by Laborers and paid at the Laborer wage rate, the Court twice admonished the Department that its attempts were without "statutory" authority and were a "guise" to unlawfully influence which union performed outdoor pipe work. *Essex I* at 214; *Essex II* at 138-39. Twice the *Essex* courts rejected the Department's "suspect" effort to classify the work as Pipe Fitter work as beyond its *statutory* authority under the Act. *Id*.

In summary, the Department's "position" as to what rate was "enforceable" – by its own admission – was clearly different prior to its enforcement of its new Rule. Indeed, its inability to impose its own preference of wage classifications is exactly why it claims it enacted the new Rule. (LF 132-33.)(change in the Rule was "to overcome the problem identified by the Court in *Essex II").* The Department admits it affirmatively changed the Laborer Definition and classifications. Yet, even if the Department could ignore this change in regulation and enforcement and show that it consistently believed this work

should have been paid as "Pipe Fitter" work, the unrebutted facts are that it was not and never has been. Regardless of why the Department effected a change from the forty year historical practice – there is simply no genuine dispute that a change has occurred now increasing the cost of public works projects due to the 42% higher required wage rates.

B. This Court Has Already Rejected The Department's Hancock Arguments.

The Department asserts a litany of purported exceptions to the Hancock Amendment, including an exception already rejected by this Court as an effort to "thwart the purpose of the Hancock Amendment." *Missouri Municipal League v. State*, 932 S.W.2d 400, 403 (Mo. banc 1996) *("MML")*. Each claimed exception should be rejected.

Citing *City of Jefferson v. Mo Dep't of Nat. Res.*, 863 S.W.2d 844 (Mo. banc 1993)("*City of Jefferson I*"), the Department contends that the higher wage classification requirements are exempt from a Hancock mandate claim because the political subdivision could simply choose "not to go through with a contemplated project." (Resp.Sub.Br. 22-23.) As discussed more fully in Appellants' Brief at 39-43, *MML*, 932 S.W.2d at 402-03, *did* in fact reject this same attempt to mischaracterize *City of Jefferson I* because that *portion* of the case, unlike *MML*, simply did not involve a mandate or an underlying discretionary activity. Rather, the first claim in *City of Jefferson I* involved no requirement at all because the statute provided that a city "may" (not "shall") elect to undertake the increased activity. *MML*, as here, did involve an increased requirement imposed on a "discretionary" activity and this Court held that the discretionary nature of

the underlying activity could not be relied on to "thwart" the Hancock protection. *MML*, 932 S.W.2d at 403.

As in *MML*, the Act is a mandatory requirement *directly* imposed on public entities. Among other provisions, the Act demands that the "public body . . . *shall* cause" to be inserted in its contract the payment of prevailing wages and "the public body *shall* specify" the prevailing hourly rate of wages in each of it public works contracts. *See* RSMo. §290.250 (emphasis added); App.Br. at 38. The public body and its officials risk criminal penalties for failure to follow the Department's requirements. RSMo. §290.340 ("officer, official, member agents or representative of any public body" subject to criminal penalties for failure to follow Act.). Thus, as in *MML*, when a state agency increases the scope and cost of an existing requirement, it makes no difference that the requirement relates to an underlying activity that is discretionary (whether providing public water or contracting for public works).

The Department fails to address the other citations contradicting the Department's reliance on the discretionary nature of the affected municipal activity. (App.Br. 41-42; *Missouri Municipal League v. Brunner*, 740 S.W.2d 957 (Mo. banc 1987)(regulations imposing increased costs on waste operations that had been "*selected* by the [municipalities] as the best methods" stated a Hancock claim despite clear discretionary nature of the underlying activity.)

Finally, this Court has recently reconfirmed that a Hancock claim is not defeated by the fact that the local government can avoid providing the underlying service. In *Alvin Brooks, et al. v. State of Missouri*, Case No. SC85674 (February 26, 2004), this

Court held that a state imposed requirement relating to the processing of concealed weapon permit applications violated the Hancock Mandate provision even though the costs resulted from a "pass through" charge imposed by a contractor to the local government and even though the local government could avoid the underlying activity itself.

In *Brooks*, the main evidence of the unfunded mandate centered on a $38 fee charged by the State Highway Patrol for fingerprint analysis for each county that undertook concealed weapon application processing. Three facts were made clear from the evidence in *Brooks*: The cost was incurred not by the county's own employees, but from a contractor (the Highway Patrol); the cost (payment of a fee to the Highway Patrol for fingerprint analysis) was not *itself* mandated by the statute, but was a consequence therefrom in the four counties; and, most "if not all" of the increased activity could be avoided if the county chose to shift the applications to a municipal police chief. Thus, it was "possible" that the contracting agent (Highway Patrol) could choose *not* to pass through the $38 cost to the county and nowhere does the Concealed-Carry Act require the county to either contract with the Highway Patrol or pay a "fingerprint fee." Rather, the statute "requires" the locality that processes applications to obtain a finger print analysis as part of such application. *Brooks* at p.3. So, while, as in *Brooks*, it is theoretically possible that the contractor performing the required public works project will not pass on the costs, such a hypothetical is no defense to the counties where actual costs are shown whether incurred by the local government "directly" or as a "pass through" from its contractor. The record reflects that cost *is* paid by the local government.

Also, as the Department argues in this case, the counties in *Brooks* could have, in theory, avoided the processing requirements altogether by avoiding the underlying activity of reviewing applications through deferral to a municipal police chief. Yet, neither the "pass through" nature of the costs nor the possibility of avoiding the underlying activity precluded this Court's holding that, in those four counties where evidence existed that the finger print requirement resulted in costs to the counties that elected to perform the application reviews, the new state application requirements violated the Hancock provision as an unfunded mandate.

Just as in *Brooks*, the question is *not* whether the local government can hypothetically avoid the costs by avoiding the service or whether the underlying activity is discretionary or preexisting; nor is it whether the costs are incurred in-house or by contract – the sole issue is whether the state action results in higher costs from imposition of a new requirement on an underlying activity that the local government does in fact undertake. Where, as here, the evidence shows that the requirement results in clearly higher costs on the local government, the mandate is unenforceable in those localities (*i.e*., the Subject Counties).

Next, the Department offers another newly-concocted exception to the Hancock Amendment by arguing that Hancock does not apply to an "activity that a public body may engage in, but has not yet chosen to do at the time of a state mandated increase …" (Resp.Sub.Br. 26.) Not only is this new exception nowhere found in the *MML, Brooks, City of Jefferson, or Brunner* decisions, it is directly contrary to the Department's first argument that Hancock did not apply *at all* to public works requirements because cities

can simply choose to avoid such requirements by ceasing all "construction projects." *Id*. at 27. These arguments are absurd. Nowhere does the Constitution prohibit only increased requirements as to "activities actually being undertaken on the date of the new requirement." If this were the case, the Department could impose new contracting requirements – such as requiring a city legal opinion with each public works contract – and claim that it is exempt from Hancock for the resulting city legal costs because new public works contracts were entered into after the new mandate!

Finally, and once again without any authority, the Department claims that its increased wage requirement is not a Hancock mandate because the increased wages are paid by the company with whom the public entity contracted – even though the public entity ultimately bears the increased cost and is criminally liable to enforce these new wage increases in its own contracts. Again, this argument seeks to circumvent the Hancock purpose. If costs or requirements imposed on employees, agents and contracts of a public entity were somehow not considered a cost or requirement to the public entity under Hancock, the legislature could circumvent all Hancock claims by simply imposing new duties on "persons contracting with or employed by local governments" but leave the local government itself off the list. So, in *MML,* the mandate could be avoided by rewriting the regulation to require "all persons whose manage any public water plant shall pay a license fee for water testing." The Department would then argue that no mandate exists because the license fee is required only on the individual officer or managing company who surely would not make the City bear the costs! Similarly, in *Brooks* the law could be rewritten to require the County to use a third-party investigation firm,

impose new fingerprinting requirements directly on such firms, *but only when they do business with counties*, and then claim the new requirements are only on the "private firms." As seen in *Brooks* (fingerprint charges), *and* in *City of Jefferson v. Missouri Dep't of Nat. Res.*, 916 S.W.2d 794 (Mo. banc 1996)("*City of Jefferson II*") (waste plan consulting charges), a Hancock violation exists even when the increased costs are due to contractual charges "passed through" from a contractor.

Here, the Act applies only to public projects; the Department's new wage requirements impose increased costs only on public projects, local governments are mandated to contract at these wage rates, and local governments (obviously) have been shown to have borne these higher costs directly due to the Department's required wage increases. The letter and purpose of Hancock prohibits this type of unfunded increase in requirements.

C. Summary Judgment Cannot Be Granted Where Department Offers No Rebuttal Evidence.

The Department offers no evidentiary challenge to Appellants' unrebutted facts. The Department instead focuses on creating an argumentative – rather than evidentiary – dispute about whether the Department changed its "position" – a point that, as noted above, is not relevant. The Department nowhere claims that Pipe Fitter wages have traditionally been paid for this work *anywhere* in Missouri at *any time* over the last forty years. In fact, the Department acknowledges that its Commission accepted the fact that Laborers "have traditionally installed pressurized pipe" and nowhere rebuts the equally

undeniable fact that the Outdoor Pipe Projects have also always been paid at the Laborer wage rate in the Subject Counties and elsewhere. (Resp.Sub.Br. 36.)

The Department's sole response is to discount the *unrebutted* evidence as not sufficiently "genuine." (Resp.Sub.Br. 34.) The Department claims that Appellants' evidence that Outdoor Pipe Projects have always been performed by Laborers at Laborer wages was not "genuine" or was "imaginary or frivolous" because it was supported in part by affidavits from just a "few individuals" (eight), with knowledge limited to a few counties (the counties at issue). (Resp.Sub.Br. 33). The evidence was hardly "imaginary or frivolous" as demonstrated by *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). Moreover, the Department was unable to offer *any* counter-evidence.

In actuality, Appellants' evidence included eight (8) unrebutted affidavits of separate contractors representing almost 50 years of experience contracting for pipe projects, all unequivocal in their testimony that such projects, whether public or private, have always been performed by Laborers paid Laborer wages in the Subject Counties and elsewhere. This is the precise testimony (many times over) specifically required by the court in *Essex I* to establish the required prevailing wage rate. 775 S.W.2d at 216.

This historical practice was, of course, also judicially confirmed (again over the opposition of the Department) in *Essex II* where the court held that the Laborer wage and not the Pipe Fitter wage was lawfully required under the Act in Jefferson County. Abundant additional and duplicative proof of this undisputed point is recited in Appellants' Opening Brief. (App.Br. 30-33.) The Department's additional attempt to

minimize *Essex I and II* as somehow based on an inexplicable absence of "evidence presented" is also spurious because the Department here was similarly unable to offer *any* counter evidence to dispute the same historical reality as to the wage rate that prevails. (Resp.Sub.Br. 34.)

The Department asks this Court to simply disregard its affirmative "change" in the "General Laborer" classification definition – from that previously used in the federal and state Annual and Project Specific Wage Orders – as not meaning what it said. Rather, so the Department argues, the original "General Laborer" definition should be read to have meant that Laborer wages should be paid only for "all work *that would typically be done by a Laborer."* (Resp.Sub.Br. 38.) This circular argument is not only directly contrary to the plain words of the original definition, it also ignores the historical fact that outdoor pipe installation *is* and always has been work "*that would typically be done by Laborers."* Thus, even under the Department's contorted explanation for its "change," the federal and prior state definitions clearly required, consistent with the *Essex* holding and the historical reality in each of the Subject Counties, payment of *Laborer* wages. The Department's retroactive interpretation espoused to this Court now is not even supported by the Department's own staff who admitted that these prior wage orders were in fact reasonably understood to require *Laborer* – not Pipe Fitter – wages on pressurized pipe work. (LF 182.)

With no rebuttal evidence of *any* kind, the Department claims this mountain of evidence is still not enough because it is not proof of "complete knowledge of such practices in the state at large." Appellants need not prove that the Hancock Amendment

has been violated in every county in the state – it need only prove that the requirement has caused a change and increased costs in the Subject Counties at issue in this case. *See Brooks v. State*, 2004 WL 350943 (Mo. Feb. 26, 2004). The fact is, however, that the Department did not rebut the local and statewide historical Laborer wage practice as to even *one* county in the state!

D. Actual Wage Practices Are Not "Immaterial."

The Department's necessary cornerstone argument is that proof that Laborers at Laborer wages have always performed the work over the last forty years is "immaterial." (Resp.Sub.Br. 34.) As discussed in Appellants' Opening Brief, the Department claims that the actual workers used and wages paid in the past (and still today) are "immaterial" to the Department's determination of the required wage for "similar work" in each locality. That is, the actual wage practices in each county or even statewide are not relevant to the Department because it only looked to national dictionary definitions and related information, but not to any evidence with any connection to actual Missouri marketplace practices. (App.Br. 51-52.) This complete disregard for the 'wages paid and the type of workmen used" both in the drafting and enforcement of its Rule, violates the Act standard for determining the prevailing wage for similar work in a locality. *City of Joplin*, 329 S.W.2d at 695. *See*, Part II, *infra*. But even if this change had not violated the Act, the imposition of a new higher wage rate is still a new wage requirement that imposes new and higher costs on local governments in violation of the Missouri Constitution. Thus, once the Court recognizes the undisputed fact that the historical wage rates required in the Subject Counties was the Laborer wage rate, the Department's

statutory claim that the Act permits it to ignore actual practices, even if correct, provides no defense to a constitutional Hancock claim.

E. The Department's Application of Pipe Fitter Wages Has Not Been Litigated Under The Hancock Amendment or Otherwise.

This case is the *first* challenge to the Department's application of its Rule to require the higher Pipe Fitter wage rate on Outdoor Pipe Projects and, contrary to the Department's assertion, the imposition of a higher wage rate on local governments has never before been litigated under the Hancock Amendment or any other basis.

The Department relies on the Western District Court of Appeals' decision in *Associated General Contractors v. Dep't of Labor*, 898 S.W.2d 587 (Mo.App. 1995) ("*AGC*"). In *AGC*, no Hancock challenge was made to any actual or threatened *application* of the Rule and certainly no issue existed as to the unlawful imposition of Pipe Fitter wages asserted in this case. Rather, *AGC* involved, *inter alia*, a challenge to the Occupational Title Rule *prior* to any threatened specific enforcement and the challenge was based on certain bookkeeping requirements in the Rule. *Id*. at 593 ("additional timekeepers" was not a new requirement). The Department cites *AGC* for the proposition that no new requirement was imposed because the Court held that the Rule merely codified "existing" practices. (*See* Resp.Sub.Br. 18-19; *see* LF 86-87, 681 (admitted that Rule was to "clarify and codify *existing* practices.")).

That facial premise in *AGC*, however, underscores the invalidity of the Department's current effort to interpret the Rule to affirmatively *change* the existing practice (including as adjudicated in *Essex II*) to now require Pipe Fitter wage rates on

Outdoor Pipe Projects. The Department's interpretation of its Rule in this case blatantly violates *AGC*'s facial premise that the Rule merely codifies existing practices. As such, *AGC* does *not* support the Department's application of the Rule, it contradicts it.

F. Pipe Fitter Requirement Has Already Increased Public Entity Costs.

The Department also claims it is possible that the wage rate might not increase because the rate for Laborers could in some counties be higher than Pipe Fitters. (Resp.Sub.Br.20.) If that ever happens in the Subject Counties, then the Department will have a defense to the Hancock claim *in that county for that period of time*. Until then, hypothetical possibilities that the Constitution might not be violated *somewhere someday* are no defense to the times and places, as proven in the Subject Counties, where a mandated increase in costs *has* already been shown. Appellants do not challenge the authority of the Department to reflect annual changes in the wages and rates that *actually* prevail in the Subject Counties. If the marketplace practices change (without illegal assistance from the Department), then the taxpayers will have no constitutional grievance.

The Department also argues that if "most or all of the work" in any given county is done by Laborers "at significantly lower wages, then that rate, if reported to the Department, would set the prevailing wage rate for the occupational title of Pipe Fitter." (Resp.Sub.Br. 53, n.6.) This ignores the obvious fact that public bodies would no longer be able to lawfully contract for and specify the lower Laborer wage without breaking the Department's new wage requirement! Because the Pipe Fitter wage is in fact 42% higher in the Subject Counties (and the Department admits it always has been higher), the

Department will require those actual higher wage rates to be paid on public projects, so the Department's Annual Wage Order the following year will reflect those higher wages, which will then result in public entities having to pay that higher rate again. The Department has therefore created a circular self-fulfilling change in the marketplace by manipulating the wage rate practices rather than *reflecting* the wage "paid generally" as required by the Act. Again, however, the Hancock issue in this case is controlled not by hypothetical situations such as offered by the Department, but by the real world higher costs that have been proven to exist in the Subject Counties. (App.Br. 36-37.)

The taxpayer Appellants offered specific unrebutted evidence that in the six Subject Counties local governments had already incurred and would continue to incur substantial additional costs due to the Department's imposition of Pipe Fitter wages. Whether the public entities paid direct "time and material" costs or whether it is simply because public contractors don't work for free – the answer is the same: increased wage rates required *only* in construction contracts of public bodies and only for workers working "on behalf of" a public body cause increased taxpayer costs. For example, the Department did not dispute that the City of St. Charles was forced to pay an additional $16,052.19 on two recent projects solely due to the Department's imposition of the Pipe Fitter rather than the Laborer wage rate. (LF 102-03, Cannon Aff. at 4-5). Similarly, it was unrebutted that Public Water Supply District #2 in St. Charles County incurred an additional $18,086.00 on a recent Outdoor Pipe Project due to the imposition of Pipe Fitter wages rather than the previously paid Laborer wages. (LF 107-08, Karsten Aff. at 4-5). The specific testimony of contractors and the Missouri Municipal League was also

unrebutted that on all Outdoor Pipe Projects in the Subject Counties, the contracting local government had paid and would directly pay the increased labor costs resulting from an imposition of Pipe Fitter rather than Laborer wages. (LF 102-03, LF 107-08; LF 89, UF 36; LF 73; *see also,* Admis. No. 13 (Department's admission that an increase in the prevailing rate classification increases "the cost of public works projects")).

G. This Case Involves Public Costs Not Private Costs.

Finally, the Department now argues for the first time that no Hancock claim is stated because the increased costs are borne by "private companies." (Resp.Sub.Br. 17, 21.) Yet, nowhere in this case is there any argument or evidence of any increased costs to "private contractors." The Department ignores the unrebutted evidence that the costs are borne by the local government (including the specific cases above) and instead just invents a claim that these increased wage rates impose only "private costs" – all wholly without citation to the record. (Resp.Sub.Br. 21.) There simply are no "private costs" at issue in the record; rather, the record contains only the unrebutted evidence of *actual* costs borne by the *local governments*, not private contractors, as a direct consequence of the Department's actions. *See* Section I.E, *supra*. The Act applies only to projects paid for by local governments and only to workers acting "on behalf" of such political subdivision. Thus, this is not a case about general increased costs to private companies incidentally affecting public entities – it is about a new requirement applicable only to such public entity-paid projects.

Similarly, the Court must reject the Department's assertion that Appellants seek to use the Hancock remedy to improperly "protect private companies" rather than local

governments. (Resp.Sub.Br. 17, 28.) Appellants' have sued as taxpayers – the only parties with standing under Hancock. The record involves public costs, not private costs. Wages paid on private outdoor projects are still the Laborer wage. (App.Br. 32.) The Act does not apply to private projects at all – rather, it is a direct obligation on public bodies to pay prevailing wages that cannot be circumvented by shifting control of a public project to a private entity. *Division of Labor Stds. v. Friends of the Zoo of Springfield*, 38 S.W.3d 421 (Mo. 2001)("A public body constructing public works may not circumvent the prevailing wage law by a 'carefully constructed legal facade.'" [citations omitted]). The Department certainly held this view when it sued the Amici City of Springfield to demand payment of the applicable prevailing wages. Having done so, the Department cannot now resort to a contrary "legal facade" in claiming that the Act imposes only "private" costs and obligations.

The remedy here is to enjoin the Department from its unlawful change in the wage rate above the rate that actually prevails in each of the Subject Counties. Even a legal facade cannot disconnect a local government's obligation to impose in its contracts payment of increased prevailing wage rates and the inevitable resulting increased cost to the local government from such mandate. The evidence showed that the imposition of the duty on local government contracts *is* an imposition on local governments. The Department can no more prevent its new increased wage requirements from being borne by the local governments than the local governments can order their contractors to provide free work! Until the legislature funds the Department's attempt to change the

marketplace, the imposition is a direct and unlawful cost to local governments and their taxpayers.

II. THE DEPARTMENT'S ADMITTED DISREGARD OF EVIDENCE OF ACTUAL WORKERS USED AND WAGES PAID VIOLATES THE ACT.

The Department's affirmative change in the wage classification actually paid in the marketplace for more than forty years violates both the letter and spirit of the Act. At issue is the Department's contention that it may determine the required wage classification rate without regard to the wage rate classification that actually is paid in a locality or even anywhere in the State.

The Department does not dispute that its imposition of the Pipe Fitter classification in the Subject Counties on Outdoor Pipe Projects was without any evidence that the wages paid or workers used on Outdoor Pipe Projects are or ever have been the Pipe Fitter wage rate. (*See* App.Br. 51-52.) The proof is unrebutted that the actual wage rates have always been Laborer rates and even the Commission accepted the "fact" that Laborers, not Pipe Fitters, "have traditionally installed pressurized pipe." (*Id*. at 11.)

This appeal does not challenge the rulemaking authority addressed in prior cases – rather, this case challenges the Department's first actual application of the Rule to enforce a wage classification contrary to what that actually "prevails" in a locality. Having no evidence to rebut the record, the Department instead claims the proof of "historical practices is really immaterial." (Resp.Sub.Br. 46; 34 (evidence of workers and wages "predominantly and customarily used" is "immaterial.").) The Department admits it did not consider the wage paid or workers actually used in requiring pipefitter wage rates

(App.Br. 5051). The simple question before this Court then is: does the Act permit the Department to determine the wage for similar work in each county without regard to and contrary to the *actual* wages paid and actual worker classifications used for such work in the locality or otherwise in the state? The answer clearly is no.

The Act requires the Department to "determine the prevailing hourly rate of wages *in each locality*" based on the "rates *that are paid* generally within the locality" for all "work of a similar character *in the locality* in which the work is performed." RSMo. §§ 290.230, 290.250-260.1 (emphasis added).

In determining "work of a similar character in the locality," this Court expressly rejected the Commission's prior attempt to impose its own predetermination of the proper rate classification, which disregarded the actual practices in the locality. In *City of Joplin*, the Court invalidated the State's wage classification imposed on sewer projects in Jasper County noting that it was "apparent" that the Commission had determined the "wage rates and craft classification" before any evidence was even heard. *Id*. at 694-95. Specifically, the Court affirmed the holding of the trial court, which found that "the wage rates determined by the [c]ommission are not in fact the prevailing rates of pay for similar work existing *in the City of Joplin or Jasper County*; and . . . . the Commission failed to give due consideration to the statutory requirement that rates as are paid generally *within the locality* should also be considered." *Id*. at 695 (emphasis added). By failing to pay heed to the evidence "both as to the wages paid and the type of workmen used," the Commission violated the statutory standard. *Id*.

The Department suggests that *City of Joplin* requires the Department to consider only the "work tasks that are similar" and "types of equipment." (Resp.Sub.Br. 47.) That is not what this Court said. Although the Court noted this type of evidence supported both classifications, it expressly rejected the Commission's disregard for the evidence relating to "the wages paid and the type of workmen used" on the "same" or "identical" work. 329 S.W.2d at 694-95.

Not only did the Department here ignore "historical practices" anywhere in the State as "immaterial" or irrelevant, it claims that "local work practices" also may be ignored in deciding what "similar work" is. (Resp.Sub.Br. 45-46.) The *City of Joplin*, however, specifically reversed the Commission in its setting of the worker classification as it failed to reflect the prevailing rates "within the locality" identified as "the City of Joplin or Jasper County." 329 S.W.2d at 695. Moreover, as noted, the Department failed to consider the "wages paid and the type of workmen used" *anywhere* in the state. (*See* App.Br. 51; LF 423.)

The Department contends that "reliance on area historical practices would also undermine the Prevailing Wage Law goal of all statewide contractors operating on a level playing field." (Resp.Sub.Br. 46.) There is no such statutory "goal." Rather, the Act expressly requires adherence to the prevailing wage in each "*locality*." This requirement of a county-by-county determination – as required in *Joplin* – clearly precludes a "statewide level playing field" because protection of the wages that prevail in the "locality" are required. In other words, statewide contractors are already subject to 115 different county wage determinations.

Finally, the Department cites *AGC*, 898 S.W.2d 587 (Mo.App.1995) and *Heavy Constructors Assoc. v. Div. of Labor Stds.*, 993 S.W.2d 569 (Mo.App. 1999) in an attempt to support its disregard of local practices or wages paid on identified work "tasks." Neither of these cases involved the Department's use of its Rule to impose a wage rate *higher* or *different* than the wage rate actually paid in the locality. Rather, each case simply addressed the Department's Occupational Title Rule on its face without any challenged application. In addition, each case held that the local tasks would still determine the wage, regardless of any statewide definition. *Heavy Constructors*, 993 S.W.2d at 573 ("Whoever performs a *task* falling within the definition of a given occupational title will still be paid the *locality wide* prevailing wage for *that* work."); *AGC* at 594 ("the Department still has the ultimate responsibility to determine the prevailing wage rate by compiling the hours worked and the wages paid for the *items within the definition*")(emphasis added). The Department's claim now that the Rule can be used to enforce a higher wage than that which actually prevails in the locality (or any locality) for that work contradicts its representations that the Rule was intended only to "clarify and codify *existing* practices." (LF 681.) To the extent that the Department seeks to interpret these two appellate cases to disregard or otherwise change those existing wage practices, the interpretation contradicts the Statute's requirement to look to the "rates that are paid" in the locality and the Supreme Court's judgment against the Commission in *City of Joplin*.

Furthermore, the Department's violation of the Act here is every bit as calculated as was the Commission's determination in *Joplin* that the Court found was made even

"before the evidence was heard." The *Essex II* decision reprimanded the Department for twice trying to determine which type of workman will be required "under the guise of enforcing" the collective bargaining agreements under the prevailing wage law. *815 S.W.2d at 138-39*. There is no dispute that the Act may not be used to control which workmen are used, regardless of claims of safety, licensing, or union affiliation. (*See* Resp.Sub.Br. 15.)

Yet, this is exactly what the Department seeks to do (again) in imposing its own worker classification and wage contrary to the actual "wages and type of workmen used" in the locality. In Commission Order dated June 11, 1997, the Commission defended its Rule in an unrelated facial challenge because a "significant *public safety* consideration is addressed by having pressurized pipe systems installed by those with greater specialized training." (LF 221)(emphasis added). How could "public safety" be affected unless, contrary to the Department's claim, its Commission intends the enforcement to have an influence on which workers perform the work? (Resp.Sub.Br. 49.) Thus, much like its unlawful attempts in *Essex I* and *II*, the Department is again manipulating who does the work – this time under the guise of "public safety." As in *Essex I* and *II* and *City of Joplin*, the Department's admitted disregard of the workers used and wages paid in the locality must be again held unlawful here.

III. THE DEPARTMENT'S INTERPRETATION OF THE RULE RESULTS IN MEANINGLESS LANGUAGE.

The Department claims its interpretation of the Rule should be accepted even though it defines "non-pressurized pipe lines" to refer to things that do not and cannot exist. By redefining Laborer work to include work on only "non-pressurized" oil and gas lines, for example, the Department seeks to disguise the fact that its interpretation has no rational connection to the real world it regulates. This, of course, is the danger in trying to use a regulation to manipulate the marketplace rather than reflect it.

Agency rules are subject to the same rules of construction as statutes. *Natural Res., Inc. v. Missouri Highway & Transp. Comm'n*, 107 S.W.3d 451, 457, n.9 (Mo.App. 2003). As a matter of law, the Department's interpretation (and its attempt to impose penalties and restitution) must be denied because it rejects the only interpretation that gives reasonable meaning to all of the words and adopts a clearly absurd interpretation now devised in order to defend the Department's unlawful enforcement in this case.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND (g)

I, Daniel G. Vogel, hereby depose and state as follows:

1. I am an attorney for Appellants Purler-Cannon-Schulte, Inc. and Karsten Equipment Co.

2. I certify that the foregoing Substitute Reply Brief of Appellants Purler-Cannon-Schulte, Inc. and Karsten Equipment Co. contains 7,691 words (including footnotes) and thereby complies with the word limitations contained in Missouri Rule of Civil Procedure 84.06(b.)

3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 2002 word processing software.

4. I further certify that the accompanying 3½" disk containing a copy of the foregoing Substitute Reply Brief of Appellants has been scanned for viruses and is virus-free.

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via first class United States mail on this 1st day of April, 2004, to:

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